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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 945

JOHN G. DUPUIS, JR.,

Petitioner,

-vs-

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Miami 32, Florida

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IN THE

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No. _____

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CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled case on March 6, 1961, which said judgment foreclosed petitioner from any relief by virtue of that certain judgment of the Supreme Court of Florida dated January 31, 1961.

OPINIONS BELOW

The judgment of the Supreme Court of Florida, dated March 6, 1961 (R. 257), has not been reported officially or unofficially. A copy is appended as Appendix I.

The judgment of the Supreme Court of Florida, dated January 31, 1961 (R. 253), is reported at 127 So. 2d 679. A copy is appended as Appendix II.

The opinion of the District Court of Appeal of Florida, Third District, which was the subject matter of the aforementioned two orders (R. 246-247), is reported at 123 So. 2d 34. A copy is appended as Appendix III. That opinion is predicated on two earlier opinions of the same appellate court, reported at 109 So. 2d 596 (R. 240-243) and appended as Appendix IV, and 105 So. 2d 36 (R. 238-239), appended as Appendix V.

The opinion of the lower court, to which all of the foregoing opinions and orders were directed, was dated August 18, 1959 (R. 221-230), and has not been officially or unofficially reported. A copy is appended as Appendix VI.

The temporary injunction that will be hereinafter referred to was entered in the lower court on November 21, 1957 (R. 9a-9b), and has not been officially or unofficially reported. A copy is appended as Appendix VII.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was entered September 19, 1960, and rehearing thereon was denied (R. 252) on October 5, 1960. On January 31, 1961, the Supreme Court of Florida denied a petition for writ of certiorari (R. 253), and thereafter denied a rehearing thereon on March 6, 1961.

The last order terminating any further litigation or

right of the petitioner to litigate in the State Courts was entered March 6, 1961.

Petitioner believes that Title 28, United States Code, section 1257, sub-section (3), confers jurisdiction on this Honorable Court to review the judgment in question by Writ of Certiorari.

QUESTIONS PRESENTED

Whether or not a State Flood Control District can take and exercise fee simple dominion and control of real property for all kindred purposes of the Flood Control District by virtue of a 1910 deed reservation to the Trustees of the Internal Improvement Fund of the State of Florida and their successors, of the reservation stated as follows:

> "Saving and Reserving unto the said, the Trustees of the Internal Improvement Fund of the State of Florida, and their successors, the right at any time to enter upon the said lands and make or cause to be made and constructed thereon such canals, cuts, sluice-ways, dikes and other works as may in the judgment of the said Trustees, or their successors, be necessary and needful for the drainage or reclamation of any of the lands granted to the State of Florida, by Act of Congress, approved September 28th, 1850, * * * ".

Does the foregoing language create an express easement as an incident and burden of ownership of 130 feet across an entire section of land owned by the Petitioner,

which may be used in perpetuity by the respondent or its assignee, the United States Corps of Engineers?

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Code, and United States Code Annotated, sets out Constitutional Amendment V., as it provides for the protection invoked in this petition. Only, the due process provision of this Amendment is involved, to-wit:

> "Nor (shall any person) be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

In 1910 the Trustees of the Internal Improvement Fund deeded, including the entire section of land owned by petitioner, 57,740 acres of land lying and being in the County of Dade, in the State of Florida, to Richard J. Bolles, and included, following the granting clauses and description of the land, the reservation above quoted verbatim in the first question presented. In 1957 the respondent informed petitioner; although it had no deed, that it claimed a right of way 130 feet wide across all of petitioner's land, and told petitioner to forthwith remove any structures therefrom (Petitioner's Exhibit 2).

On August 19, 1957, petitioner brought his Bill of Complaint to Enjoin Trespass, Clouding Title, and for Other Relief in the Circuit Court of the Eleventh Judicial

Circuit, in and for Dade County, Florida, in Chancery, which is the trial, or lower court (R. 1-7).

The respondent filed a general denial thereto and affirmatively alleged that the aforementioned reservation could be obtained by respondent at a later date and get the right to make any improvement in or upon the lands of the petitoiner, as a part of respondent's overall program for flood control, reclamation, drainage and kindred purposes (R. 8-9).

On November 20, 1957, the trial court entered a temporary injunction restraining the respondent from clouding the petitioner's title (R. 9a-9b). A copy is appended as Appendix VII.

On December 6, 1957, sixteen days later, the respondent took a conveyance from the Trustees of the Internal Improvement Fund of approximately 16 acres of land across petitoiner's lands, being a strip 130 feet wide, and the same was recorded on the 12th day of December, 1957, in the Official Records of Dade County, Florida (Respondent's Exhibit E).

The trial court, on the pleadings, pre-trial conference statements and admissions, answers to interrogatories, testimony taken before the Court and exhibits before the Court, entered its Final Decree and Judgment (R. 221-230), after numerous findings of fact, among them being that the respondent was trying to exercise fee simple control over petitioner's lands, and enjoined the respondent from entering into petitioner's lands or clouding his title unless respondent should pay the damages and fees of approximately $174,000.00 found by the trial court as

being the value of the land and damages and fees that the respondent sought to appropriate for its public purposes.

Thereafter the respondent filed its appeal which resulted in the opinion of the District Court of Appeal of Florida, Third Districted, dated September 19, 1960 (R. 246-247), and which is appended hereto as Appendix III. This opinion on the record before the Court would allow respondent or its' grantees to take the entire section of land from petitioner for all of respondent's kindred purposes.

After a denial of the Petition for Rehearing by the appellate court the petitioner sought a petition for Writ of Certiorari, which was denied by the Supreme Court of Florida (R. 253), and a motion to attempt to have a rehearing thereon was denied on March 6, 1961 (R. 257).

The petitioner, in his original Bill of Complaint to Enjoin Trespass (R. 1-7), asserted his fee simple ownership personally, and possession and payment of all taxes, since the year 1931, and claimed under a chain of title that showed no derogation of the fee for more than 40 years, and stated specifically that the respondent, nor anyone claiming under it, had paid any money or valuable consideration, nor secured to the petitioner any payment for the taking of petitioner's land for public use without payment of just compensation. At the time of the filing of the Bill, as aforesaid, the respondent had not actually taken possession of petitioner's property.

The respondent's Answer (R. 8-9), claimed that it had the right to take petitioner's property without payment

of just compensation, and the lower court refuted the respondent's contention, entering a temporary injunction (R. 9a-9b), pending payment for the land, and if the respondent failed to do that, made the injunction permanent.

Up to this point there was no need, other than in general terms, to discuss the constitutional protection of the United States to petitioner.

The District Court of Appeal of Florida, Third District, then entered it's judgment and opinion dated September 19, 1960 (R. 246-247, Appendix III), relying on its two earlier opinions dated March 3, 1959 (R. 240-243, Appendix IV), and July 24, 1958 (R. 238-239, Appendix V), and for the first time petitioner was presented with the proposition that the respondent was actually going to take petitioner's property without payment of just compensation.

At that point the petitioner, in a Petition for Rehearing (R. 249-251), a copy of which is appended as Appendix VIII, tried to point out that the United States Supreme Court had ruled that after a temporary injunction had issued against the clouding of title, the Trustees of the Internal Improvement Fund of the State of Florida could not give a valid instrument that would cloud the title or convey title.

Petitioner then raised the question that the Constitution of the United States would be violated if the appellate court overlooked the finding of law of the lower court that petitoiner's property could not be taken for public purposes without payment of just compensation.

This Petition for Rehearing was filed in the District Court of Appeal of Florida, Third District, on the 3d day of October 1960 (R. 249-251, Appendix VIII), and was propmtly and summarily, and without opinion, denied October 5, 1960 (R. 248).

These two direct contentions were the subject matter of the Petition for Writ of Certiorari to the Supreme Court of Florida, that is, that the Trustees tried to convey title after the entry of a temporary injuncion, to the respondent, and that the lower court had enjoined permanently the taking of private land for public purposes without payment of just compensation. The Supreme Court of Florida denied the Petition for Writ of Certiorari (R. 253), and denied rehearing thereon on March 6, 1961 (R. 257), although Florida Appellate Rules do not provide for permit argument on these points, but only as to whether or not the opinion of the District Court of Appeal directly conflicts with a Florida Supreme Court opinion, or that of another appellate court.

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN THE INSTANT CASE BECAUSE TITLE TO LITERALLY HUNDREDS OF THOUSANDS OF ACRES OF SWAMP LANDS CONVEYED BY THE UNITED STATES GOVERNMENT TO THE STATE OF FLORIDA IN 1850 WILL BE PERPETUALLY CLOUDED IF THE STATE COURT'S ACTION IN GRANTING TO THE RESPONDENT STATE AGENCY THE RIGHT TO TAKE PRIVATE PROPERTY FOR PUBLIC PURPOSES UNDER THE LIMITED LAN-

GUAGE OF A RESERVATION THAT DOES NOT AMOUNT TO AN EASEMENT, EXCEPTION OR OTHER DEROGATION OF THE GRANTED TITLE.

This statement alone we believe is sufficient for this Court to take jurisdiction and grant the Writ of Certiorari because the United States Supreme Court and the Federal Courts, and in fact no other State court or court of English law, have ever entered an opinion that would authorize the expanding, liberalization and destroying effect as to call the heretofore quoted reservation, which no where shows where it is located, how wide, or how deep or how long it could be used, to be such a derogation from the grant of the fee title to warrant the taking of the fee simple title to the land. In fact it demolishes the original deed of 1910 entirely.

We think the most concise statement possible is, that the Constitution of the United States under the due process clause says, "No private property shall be taken for public purposes without just compensation."

Petitioner is in the unfortunate position of not being able to cite to this Honorable Court a decision of the Supreme Court of the United States that would say such a reservation would not authorize the taking of the fee for public purposes without just compensation. Petitioner is also in the unfortunate position of not being able to similarly cite a case that says such a reservation does not constitute an easement because it nowhere definitely locates the length, width, or placing of the canal. This is true only because no public body would ever have dared bring such a proposition to the Supreme Court of the

United States in view of the constitutional protection afforded private property owners. We have, however, in the State of Florida a case determined by the Florida Supreme Court in the year 1915 which says that the **exact same reservation** is no encumbrance on the technical fee, and a prospective purchaser could not object to the reservation as an encumbrance on the title and had to complete his purchase, **Richardson-Kellett Co.** v. **Kline**, 70 Fla. 23, 69 So. 203.

The record shows (petitioner's Exhibit 6) the Articles of Agreement under which the Trustees of the Internal Improvement Fund of the State of Florida conveyed this land to Richard J. Bolles, predecessor in title to petitioner. That Agreement definitely locates five canals to be dug in a southerly direction from Lake Okeechobee for the purpose of lowering the waters of Lake Okeechobee four feet, and none of these canals is even located in the same section as petitioner owns, and respondent now seeks to dig a new canal not contemplated in the ancient Agreement.

Respondent cannot even show this Court any Federal or State authority that would permit the above language to be considered as an easement, and petitioner earnestly submits that the United States Supreme Court has never permitted the taking away of fee title by the vague wording of a reservation like that above quoted.

There can be no question but what the respondent is taking and exercising fee simple title, for the Deputy Tax Assessor of Dade County stated (R. 114-119) that the approximate sixteen acres of petitioner's land would be cut out, that is, deleted from the tax roll as owned by

petitioner, and would be designated public land. Further, the engineer for the respondent testified (R. 159) that the canal right-of-way would probably be fenced to keep cattle from coming onto the canal banks, and dairying is petitioner's business. This engineer further testified (R. 159-160) that the petitioner would have no control over the waters of the canal, or even the right without permit, to expel water into the canal or take it from the canal; (R. 160) that no permanent structure would be permitted; that everyone, including the public and the petitioner, would be excluded from these lands by the respondent (R. 164), and that **the purpose (R. 148) is to the effect to make a subdivision less costly to subdivide and develop because the canal to be built would lower the amount of fill needed to meet flood criteria.**

It is noted for the Court that although the trial court's finding of fact that respondent was taking fee simple control was challenged by an assignment of error, it was not argued or briefed in the appellate court, and that finding must stand according to Florida law.

Petitioner further believes that the ruling of the state courts after the judgment of the trial court in this case, are directly in conflict with the case earlier decided by the United States Supreme Court, which is **Union Trust Co. v. Southern Inland Nav. & Imp. Co.**, 130 U.S. 565, 9 S.Ct. 606, 32 L.Ed. 1043. This case held that the Trustees of the Internal Improvement Fund could not pass a valid title after a court had entered a temporary injunction against such a conveyance, which is exactly what is presented to this Honorable Court in this case.

CONCLUSION

Therefore the petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of Florida.

Dated this _____ day of May, 1961.

Respectfully submitted,

B. E. HENDRICKS and
JOHN E. KIRK
Attorneys for Petitioner
414 Seybold Building
Miami 32, Florida

B. E. HENDRICKS

JOHN E. KIRK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was delivered to CHAS. H. GAUTIER, Attorney for Respondent, 10th Floor, Dade Federal Building, Miami 32, Florida, this _____ day of May, 1961.

Of Counsel

APPENDIX I

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1961

MONDAY, MARCH 6, 1961

JOHN G. DUPUIS, JR.,

Petitioner,

vs.

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

The petitioner in the above cause has filed a motion fora waiver of Florida Appellate Rule 4.5, Sub-section c(6), or consent of the Court to reconsider this cause with exhibits before it, and upon consideration thereof, it is ordered that said motion be and the same is hereby denied.

A True Copy
TEST:
Glyte P. McCord
Clerk Supreme Court.
(SEAL)

APPENDIX II

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1961

TUESDAY, JANUARY 31, 1961

JOHN G. DUPUIS, JR.,

Petitioner,

vs.

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date September 19, 1960 (petition for rehearing denied October 5, 1960), and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy
TEST:
Guyte P. McCord
Clerk Supreme Court
(SEAL)

APPENDIX III

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1960
CASE NO. 59-528

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Appellant,

-vs-

JOHN G. DUPUIS, JR.,

Appellee.

Opinion filed September 19, 1960.

An Appeal from the Circuit Court for Dade County, Robert H. Anderson, Judge.

Sturrup & Gautier, for appellant.

John E. Kirk, for appellee.

HORTON, Chief Judge.

The defendant appeals from an adverse final decree and judgment in an action brought by plaintiff to enjoin the Central & Southern Florida Flood Control District from exercising its rights under a certain reservation assigned to it by the Trustees of the Internal Improvement Fund of Florida. The reservation assigned to the District was contained in a deed given by the Trustees to the plaintiff's predecessor in title and granted the right to the Trustees or their successors at any time to enter upon the land and construct canals, cuts, sluice-ways, dikes and other work necessary to carry out drainage or reclamation.

The validity of these grants was discussed and decided by this court in Albury v. Central & Southern Florida Flood Control District, Fla. App. 1958, 99 So. 2d 248. We adhered to the Albury decision in two prior appearances of this case in this court. In the first appearance[1] the appeal was from a summary final decree in favor of the present appellee. The second appearance[2] was an interlocutory appeal from an order denying the present appellant's motion to dismiss based upon this court's decision and mandate in the first appearance wherein we reversed the summary final decree. Due to the limited scope of review occasioned by the interlocutory appeal in the second appearance, the majority of this court were of the view that an affirmance of the order sought to be reviewed was the limit of this court's jurisdiction of the subject matter. This latter statement is made in the light of the District's contention, with the concurrence of one member of the court, that the complaint or action should have been dismissed.

The final decree and judgment now up for review in effect rendered unenforceable, if not invalid, the reservation and the rights of the District thereunder. Such conclusion and effect is in conflict with the prior pronouncements of this court.[3]

Accordingly, the final decree and judgment appealed are reversed and the cause is dismissed.

PEARSON and CARROLL, CHAS., JJ., concur.

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(1)Central & Southern Florida Flood Control District v. Dupuis, Fla. App. 1958, 105 So. 2d 36.

(2)Central & Southern Florida Flood Control District v. Dupuis, Fla. App. 1959, 109 So. 2d 596.

(3)Albury v. Central & Southern Florida Flood Control District, supra; Central & Southern Florida Flood Control District v. Dupuis, supra.

APPENDIX IV

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1959

CASE NO. 58-675

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Appellant,

-vs-

JOHN G. DUPUIS, JR.,

Appellee.

Opinion filed March 3, 1959.

An Interlocutory Appeal from the Circuit Court for Dade County, Robert H. Anderson, Judge.

Sturrup & Gautier, for appellant.
Ives & Kirk, for appellee.

PER CURIAM.

The defendant brings this interlocutory appeal to review the trial court's denial of a motion entitled "Motion for order of dismissal on mandate", in which the defendant moved the court "to enter an order on the mandate filed in said cause, dismissing the action against defendant." The mandate in question was issued pursuant to the opinion of this court in Central & Southern Florida Flood Control District v. Dupuis, Fla. App. 1958, 105 So. 2d 36. By the opinion in that appeal we determined that this cause is controlled by the decision in Albury v. Cen-

tral & Southern Florida Flood Control District, Fla. App. 1958, 99 So. 2d 248. Upon authority of the Albury decision we reversed the summary final decree entered by the trial court in this case. The Flood Control District now argues that upon that determination the complaint should be dismissed.

The question posed is not before us upon this interlocutory appeal. The scope of interlocutory appeal is limited to a review of the order appealed. Robinson v. Croker, 117 Fla. 582, 158 So. 123; Hollywood, Inc. v. Clark, 153 Fla. 501, 15 So. 2d 175, 181.

We would be unable to determine the broad question presented upon the limited record of the interlocutory appeal, even if it were proper to do so. However, in the light of the arguments presented, it may not be idle to refer to that portion of the opinion in Central & Southern Florida Flood Control District v. Dupuis, supra, which determines that the validity of the particular reservation involved is not subject for trial in this cause.

Affirmed.

HORTON, and PEARSON, JJ., concur.

CARROLL, CHAS., C.J., dissents.

CARROLL, CHAS., Chief Judge (dissenting).

I respectfully dissent from the majority judgment of affirmance.

In the Albury[1] case we established that the District is entitled to exercise the rights reserved by the Trustees of the Internal Improvement Fund in the Bolles deed of May 28, 1910,[2] which involved the plaintiff's property and other lands.

In this present case we first reviewed and reversed, as being contrary to and controlled by the holding in the Albury case, a summary decree, which had granted an injunction against the District, and which had allowed fees to the attorneys for the plaintiff for obtaining the injunction.[3] Our opinion on that earlier appeal in this case is reported in 105 So. 2d 36.

Here the District had not entered into possession of any part of the plaintiff's property involved in the suit. The complaint sought a decree enjoining the District from exercising, as to plaintiff's lands, the rights reserved in the Bolles deed, or, as an alternative, that the District be required to pay for the land used, as in condemnation. As the relief sought by the complaint was

[1] Albury v. Central & Southern Florida Floood Control District, Fla. App. 1958, 99 So. 2d 248.

[2] The reservation therein reads as follows: "Saving and Reserving unto the said, the Trustees of the Internal Improvement Fund of the State of Florida, and their successors, the right at any time to enter upon the said lands and make or cause to be made and constructed thereon such canals, cuts, sluice-ways, dikes and other works as may in the judgment of the said Trustees, or their successors, be necessary and needful for the drainage or reclamation of any of the lands granted to the State of Florida, by Act of Congress, approved September 28th, 1850, and to take from the said lands hereby conveyed and to use such gravel, stone or earth as may, in the judgment of the said Trustees, or their successors, be necessary to use in the making and construction of said canals, cuts, sluice-ways, dikes and other works upon said lands for the purpose aforesaid."

[3] The award of attorney fees which was reversed was not supported by any statute, or contract for payment by the District. See Brite v. Orange-Belt Securities Corp., 133 Fla. 266, 182 So. 892; Dorner v. Red Top Cab & Baggage Co., 160 Fla. 882, 37 So. 2d 160; Phoenix Indemnity Co. v. Union Finance Co., Fla. 1951, 54 So. 2d 188; Hoffman v. Barlly, Fla. App. 1957, 97 So. 2d 355. Cf. Jacksonville Express Auth. v. Henry G. Du Pree Co., Fla. 1959, 108 So. 2d 289, 293-5.

unwarranted, under the Albury case, our reversal of the summary decree which granted plaintiff an injunction had the effect of ending the case.

On reversing the injunction decree against the District (105 So.2d 36), this court did not direct dismissal. The subsequent motion filed by the District simply asked the chancellor to dismiss the cause on the mandate, and although the mandate did not expressly require it, a dismissal was the indicated order.

Even in the absence of a motion by the District for summary judgment after our reversal of the injunction against the District, the District's motion for dismissal of the cause should have been granted. When it appears that the party moving for summary decree is not entitled to such decree, but the opposing party is entitled to a decree in its favor as a matter of law, the trial court may grant such decree to the non-moving party. Carpineta v. Shields, Fla. 1954, 70 So.2d 573, 48 A.L.R. 2d 1185.

The chancellor, however, denied the District's motion to dismiss, by an order which also provided that "this cause will be heard and considered on the taking of testimony, and the presentation of evidence at final hearing." On this appeal from that order, this court should direct the entry of a summary decree for the defendant and a dismissal of the cause, as under our earlier ruling in this and the Albury cases the relief sought in this suit is unavailable to the plaintiff, and nothing proper remains to be tried. We are authorized, under Sec. 59.34 Fla.Stat., F.S.A.,[1] to make such "decree as the court below should

[1] "The court, on an appeal, shall examine the record, and reverse or affirm the judgment, sentence or decree of the court below; give such judgment, sentence, or decree as the court below should have given; or otherwise as to it may appear according to law."

have given." See Tampa Electric Co. v. Ferguson, 96 Fla. 375, 118 So. 221, 212; Story v. First Natl. Bank & Trust Co. in Orlando, 103 Fla. 399, 139 So. 179, 185-6; State ex rel Mercantile Investment & Holding Co. v. Tedder, 150 Fla. 175, 8 So. 2d 470; Cason v. Baskin, 159 Fla. 31, 30 So. 2d 635, 640; Kuharski v. Lake County Citrus Sales, 61 So. 2d 495, 497; 6 Moore, Federal Practice, Sec. 56.12 (2d ed. 1953). Cf. Palm Beach Estates v. Croker, 106 Fla. 617, 143 So. 792.

For the reasons stated, I am of the opinion that the order appealed from should be reversed, and the cause dismissed.

APPENDIX V

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D., 1958

CASE NO. 58-52

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Appellant,

-vs-

JOHN G. DUPUIS, JR.,

Appellee.

Opinion Filed July 24, 1958.

An Appeal from the Circuit Court for Dade County, Robert H. Anderson, Judge.

Sturrup & Gautier, for appellant.
Ives & Kirk, for appellee.
PER CURIAM.

The appellee sued to enjoin appellant Central and Southern Florida Flood Control District from entering upon his lands for the announced purpose of constructing and maintaining a drainage canal, or to require appellant first to condemn and pay for the land.

The District answered claiming, as successor and assignee, an easement reserved by the Trustees of the Internal Improvement Fund. On motion of the appellee, the chancellor entered a summary final decree granting a permanent injunction against the Flood Control District and awarding appellee's attorneys a fee of $15,000.00.

The case is controlled by the recent decision of this court in Albury v. Central and Southern Florida Flood Con. Dist., Fla. App. 1958, 99 So. 2d 248, in which we held that the deed reservation, relied on here by the District, was valid and enforceable by the District. In that case, and here, the property was subject to the same reservation made in the former deed. Having fully dealt with and determined the questions involved, in the opinion and judgment in the Albury case, there is no need to restate those matters here; and on the authority of that case the summary final decree in this cause dated January 20, 1958, is reversed.

Reversed.

CARROLL, CHAS., C. J., HORTON and PEARSON, JJ., concur.

APPENDIX VI

FINAL DECREE AND JUDGMENT

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY — IN CHANCERY NO. 204625

JOHN G. DUPUIS, JR.,

Plaintiff,

-vs-

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Defendant.

THIS CAUSE coming on to be heard before me on the Bill of Complaint to Enjoin Trespass, Clouding Title, and for Other Relief, and the Amendment thereto, and on the Answer thereto, and the Court hearing testimony of the witnesses for both plaintiff and defendant, and after consideration of the pleadings as amended during the trial, and the Court reading the transcript of the record and examining the exhibits submitted by the parties, and the Court having heard arguments of counsel and being otherwise fully advised in the premises, this Court finds as follows:

The plaintiff, JOHN G. DUPUIS, JR., is the owner of all of the N-½ of the NE-¼ and the SE-¼ of the NW-¼ of Section 2, Township 53 South, Range 40 East, acquiring said land by Deed dated September 9, 1931, which was recorded September 11, 1931, in the Public Records of Dade County, Florida.

Since that time the plaintiff has fenced said lands completely and has constructed cattle pens, cattle lanes, planted trees and grasses, and has used said lands in his business of dairy farming continuously. He has paid all taxes, assessments and expenses of said lands, including paying to the Everglades Drainage District for drainage taxes since 1931, and payment to the defendant since 1949, all taxes levied and assessed by the defendant for its purposes. He has had full and complete adverse possession for more than 25 years. The plaintiff has a complete drainage system, including pumps, drains and canals, that have satisfactorily taken care of his problems on the land above described, and other lands owned by him in the same Section, amounting to a total of over 700 acres, since the installation of the pumping system following the floods of the year 1947.

The map shows plaintiff's lands to be between the municipalities of Hialeah and Hialeah Gardens in Dade County, and the testimony shows that the area to the immediate east is highly developed residential property, adequately served for all flood control and drainage problems by two canal systems. The area west of the subject property is the municipality of Hialeah Gardens which has some homes, farms and businesses, separated from plaintiff's lands only by the recently constructed Palmetto By-Pass. A canal is dug from Palmetto By-Pass westerly to Miami Canal.

Under date of April 17, 1957, the defendant, through its agent, McCray, addressed a letter to the plaintiff advising him that they were going to take and use a 130-foot right-of-way across the entire Section 2, and advised that the defendant was going to make immediate use of

the plaintiff's lands, and directed the plaintiff to forthwith remove any structures that plaintiff might have along the right of way. This letter does not show that plaintiff could determine where said 130-foot wide right of way was to be located. At the trial, however, the defendant introduced a map or sketch that showed the location, along with an instrument styled, "Deed - Rights in Reservations", giving a lengthy legal description, and was dated December 6, 1957. This suit was commenced on August 19, 1957, and the file reflects that the instrument above referred to was placed of record following this Court's Order dated November 20, 1957, enjoining the defendant from a trespass or further clouding of plaintiff's title.

In the defendant's Answer to the Bill of Complaint there was no claim that the defendant had any title or reservation or easement of any of plaintiff's lands, but merely stated that the reservations created in a Deed from the Trustees of the Internal Improvement Fund of the State of Florida to Richard Bolles in 1910 were available to it for any improvement in or upon the plaintiff's lands, and would be permissible as a part of defendant's overall program for flood control, drainage and kindred purposes. This Court finds that the 1910 deed was carrying out the agreement between the aforenamed parties which was made in 1908, which was also introduced in evidence by the plaintiff, in which five major canals from Lake Okeechobee, and several possible spur canals, were all delineated with certainty, the nearest of which would be the Miami Canal, and none of them in the location where the defendant seeks to put its canal.

Because of the defendant's threat to immediately

use the land this Court finds that the Bill of Complaint filed by the plaintiff was one to stop a forcible ejectment of the plaintiff from the lands to which he held the only record title as between the two parties. I find that the equities in this cause are with the plaintiff and against the defendant. Equitable estoppel is a proper defense to an action of ejectment in Florida. **Florida Land Investment Co.** v. **Williams**, 116 So. 642. Defendant, to be successful in its ejectment, would have to show superior title in itself, **Alford** v. **Sinclair**, 55 So. 2d 727, and the defendant cannot eject the plaintiff in possession by showing title as in this case in the Trustees of the Internal Improvement Fund in a third person, **Hogans** v. **Carruth**, 19 Fla. 84, and the defendant cannot avail itself of a title which did not exist in it until after commencement of the ejectment action. **Paul** v. **Fries**, 18 Fla. 573; **Carn** v. **Haisley**, 22 Fla. 317.

The testimony of the defendant's engineers established beyond any question that there are no lands, which were Swamp Lands, conveyed to Florida in 1850, that would be drained and reclaimed by the construction of a canal across plaintiff's property, it being admitted that all lands are drained and reclaimed that are either being farmed or used as residence or businesses at this time. The only reclamation that they can point to is that they claim to be able to make the land more useful for higher type purposes—for instance to make farm lands available as housing projects and requiring less fill than would be required to do that function now. Another purpose mentioned by the engineers is to provide a method for water conservation, and a third purpose is to control salt water intrusion many miles to the east of the plaintiff's property. I find that said purposes are beyond the scope of

the original reservations and are not authorized by the legislative act creating the Flood Control District, and as noted in the opinion **Albury v. Central and Southern Florida Flood Control District**, quoting from the case Richardson-Kellett Co. v. Kline, 69 So. 203, 208, that the only reason the Trustees could go on the land was "solely for the purpose of betterment thereof by drainage in the proper exercise of their trust ***." I find that the plaintiff's lands will not be bettered by the placing of this canal, and in fact it appears that the plaintiff will have to spend $15,000 in relocating his drainage system if the canal is constructed.

I also note from the Albury case above cited that in that case, which was interlocutory appeal, there was an absence of a showing that the purposes for which the canal was being dug were beyond the scope of the original reservations. Salt water control, making farm land more suitable for subdivision purposes, and water conservation are clearly not within the purposes contemplated in the original reservations, and it affirmatively appears in the contract between the Trustees of the Internal Improvement Fund and Richard Bolles that the only concern at that time was to lower the waters of Lake Okeechobee through five major canals, of which Mr. Bolles had the right to control the construction, location, and even had the right to cause those canals not to be constructed if he withheld payment of certain sums to the Trustees for that purpose. It may be that the State of Florida, through this agreement was seeking to avoid the so-called Disston Contract, which gave all private drainage to Disston, so that Bolles could invest his money in purchasing alternate sections of land and dig the five main canals so that private drainage canals could be connected to them, and the

Trustees and Bolles would both end up with sections of land that could be sold as farm lands and be available to be given by the State as useable homesteads. In the facts of this case, this Court finds that there is no exact legal description or definition in the so-called reservations, and they are so broad and so vague, and would not be a right which would, 47 years after being made, authorize the defendant or any State Agency to enter upon highly developed land in the immediate path of municipal growth and expansion and to take 15.9 acres of land valued at $119,400 by the expert witness of the plaintiff, and at $4,500 per acre by the expert witness produced by the defendant.

The defendant's engineer, Storch, testified that the plaintiff would have no control over the waters in the canal, would not be permitted to place any structures on the canal banks or in the canal, would have to get a permit from defendant to pump water or connect to the canal, and that fences would probably be erected to keep cattle from coming to the canal and breaking down the banks, and that all persons would be excluded from the 130-foot right of way. This, together with the right asserted in the defendant's Deed from the Trustees to perpetually use and occupy the 130 feet, and to convey it to a third person, in addition to the document filed with the Tax Assessor, styled "Certified List of Tax Exempt Lands", would have caused the Tax Assessor, (except for this litigation) to make a tax cut-out of the plaintiff's ownership and a right to claim the land, in the taking of the fee simple title. It bars him from any incident of ownership and a right to perpetually use and occupy it and is not within the reservation entitling the Trustees or their successors to enter upon the land and construct a canal

necessary, in the judgment of the Trustees or their successors for the drainage or reclamation of the Swamp Lands. The reservation grants no title or interest in the fee, nor does it even mention maintenance.

This Court is cognizant of the earlier decision in this case, citing the Albury case. It is also familiar with the case of **Doyle** v. **Tutan**, Fla., 110 So. 2d 42, decided at a later date. It appears that the District Court of Appeal, Third District, has receded from the strict interpretation of equitable estoppel mentioned in the Albury case and has acknowledged that silence as well as overt acts can result in an equitable estoppel. The defendant, or the Trustees under whom it claims, first of all took money for the payment of the fee simple title to the land and permitted the plaintiff to enclose with fences, construct cattle pens, cattle lanes, improve with grasses and trees for shade, construct his own drainage system and make this a part of a going business since 1931, and has permitted him to pay taxes since 1931 to all taxing authorities, including taxes to itself since 1949, said levies being against this 15.9 acres of land. Plaintiff has even purchased tax certificates on part of the lands and the State has benefited from those purchases. Defendant has tendered no reimbursement for expenses, taxes, construction or assessments. I find that the above conduct is sufficient to equitably estop the defendant within the language announced in **Doyle** v. **Tutan**, supra.

The defendant's engineer, Storch, also testified that this canal empties into a canal where they do not have a 130-foot right of way, and that this could be done because the lower part of the canal is maintained in a different manner than is contemplated on the plaintiff's

land, although somewhat more expensive. I find that the defendant is trying to take under the reservation more right of way than is needed, and that it is inequitable to require the plaintiff to give up any more land than just for the canal itself, which the testimony shows that the top width of the canal would be 65 feet. This Court notes that the interrogatories filed by the defendant show that the Board of the Central and Southern Florida Flood Control District never acted or exercised the judgment required under the reservation, and that in fact the size of this canal was determined by the United States Corps of Engineers, a complete stranger to this proceeding, and it appears that the Federal Government would supervise the actual construction and that only after the actual construction and completion of the project would the District take over to operate and maintain the works constructed under the supervision of the Corps of Engineers. This can only mean that the Flood Control District is seeking to turn over the plaintiff's lands to the United States Government, and I find that this is not authorized by the reservation.

During the course of the trial, after offering certain proof the plaintiff moved, in accordance with said proof, to amend the Bill of Complaint by pleading that Florida Statute 95.021 (which makes any 20-year statute of limitations apply as to State Agencies, Municipalities and Counties) legally limited and estopped the defendant from taking under this reservation. The amendment was granted and generally denied by defendant's Answer thereto. The proof shows that the plaintiff has held under a deed having in it no reservation of record for more than 20 years—in fact 26 years—without the defendant making claim to any part of this land. I find that the Statute

above cited, and Florida Statute 95.23, would protect the plaintiff in this instance. I further find that the reservation is in the nature of a contract or agreement in the Deed of 1910, and that if the Trustees or their successors wanted to exercise that contractual right they would have to do so within the 20 years, according to the provisions of Florida Statute 95.11, sub-section (1), which they have failed to do.

The Legislature of 1953 passed Ch. 28270 which added Sec. 95.021 to the Florida Statutes. It reads as follows:

> "(1) The provisions of existing law, whether provided for in this chapter or any other chapter of Florida Statutes, whereby an action is barred if not commenced within twenty years, shall apply to any action by the state, or any of its agencies, or by any officer or persons on behalf of the state or any of its agencies, or by any county or municipal corporation of the state.
>
> "(2) The state, or any of its agencies, or any officer or persons on behalf of the state or any of its agencies, or any county or any municipal corporation shall have a period of one year from the effective date of this act in which to commence any action which would otherwise be barred by reason of the provisions of this act."

It is true that sub-section 2 was repealed by Ch. 57.1 because "it is obsolete." That simply means that the period of one year granted by the 1953 Act had expired. That was sufficient time to give the state or any of its agencies coming under the ban of the statute time in

which to bring its action and to save it from the bar of Section 33 of Article III of the Constitution providing that no statute shall be passed lessening the time in which a civil action may be commenced on any cause of action existing at the time of its passage. This has been held to be sufficient to protect the Act from the Constitutional barrier. **HKL Realty Corporation** v. **Kirtley,** 74 So. 2d 876; **Mahood** v. **Bessemer Properties,** 154 Fla. 710; 18 So. 2d 775; 153 ALR 1199.

I find from the evidence adduced that the valuation by the plaintiff's expert witness of $7,500.00 per acre, or a total of $119,400.00, is the fair market value of the 15.9 acres that the defendant seeks to appropriate, as it appears from the testimony that in the recent past the plaintiff has been paid as much as $12,000.00 an acre for a gas line easement that is under ground. I further find that the plaintiff is entitled to the sum of $15,000.00 for relocating his drainage equipment and construction because of the canal. I further find that the plaintiff has been in business for over five years at the place of the taking and that his loss, while relocating that portion of the business lost by the taking, would result in damages in the sum of $25,000.00.

I further find that the sum of $15,000.00 which was uncontroverted by the defendant, is a reasonable fee to be paid to the attorney for the plaintiff.

Therefore, it is,

ORDERED, ADJUDGED and DECREED that the defendant, and anyone claiming by, through or under it, is permanently enjoined from entering into or clouding

the title of the plaintiff in the land involved in this action, and that the Deed filed by the defendant and dated December 6, 1957, should be expunged from the Records of Dade County, and that the Certified list of Tax Exempt Lands in Dade County filed by the defendant with the Tax Assessor of Dade County, insofar as it relates to any lands of the plaintiff, should be expunged until such time as the defendant shall pay to the plaintiff the sum of $159,400.00 as his damages, and for the taking of the right of way across his property, which under the Eminent Domain Statute of this State must be paid within ten days of the date of this judgment, together with the sum of $15,000.00 hereby determined to be a reasonable attorney's fee for the attorney representing the plaintiff.

It is further ORDERED, ADJUDGED and DECREED that in the event the defendant determines not to continue with the appropriation of the plaintiff's land, that the defendant shall pay to the plaintiff a reasonable attorney's fee hereby assessed in the sum of $15,000.00, because the situation here presented is no different than if the defendant had started a condemnation proceeding and then decided to dismiss it after the plaintiff had employed and received the services of an attorney.

It is further ORDERED, ADJUDGED and DECREED that all of the land first described in this opinion shall be quieted forever in and to the plaintiff, JOHN G. DUPUIS, JR., unless defendant shall pay the above amounts, and if defendant does pay them the 15.9 acres shall become the property of the defendant.

It is further ORDERED, ADJUDGED and DECREED that all costs of this action are hereby assessed against the defendant.

DONE and ORDERED at Miami, Dade County, Florida, this 18 day of August, 1959.

ROBERT H. ANDERSON,
CIRCUIT JUDGE

APPENDIX VII

ORDER ON MOTION FOR DECREE ON BILL AND ANSWER AND ORDER ENTERING TEMPORARY INJUNCTION

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY — IN CHANCERY NO. 204625

JOHN G. DUPUIS, JR.,

Plaintiff,

-vs-

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Defendant.

THIS CAUSE coming on to be heard before me this day on the motion of the plaintiff for decree on bill and answer, and the Court hearing arguments of counsel and examining the Court file, and it appearing to the Court that certain facts must be presented at a later date before a permanent injunction would like, but that the pleadings and statements of counsel, and advices to the Court at this time, require and authorize the entry of a

temporary injunction against the defendant, and the Court being fully advised in the premises,

It is ORDERED, ADJUDGED AND DECREED that the defendant, CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT, and anyone claiming through, by, or under them, be and they are hereby enjoined until final disposition of this cause from clouding the title of the plaintiff in any of the lands mentioned in this action, and they are further enjoined from any entry upon, or trespass upon any of the lands of the plaintiff, and they are hereby further enjoined from taking, cutting, severing or otherwise removing from the plaintiff's lands any top soils, sub-soils, rock or other material of any kind and nature, and are hereby enjoined from hauling off or carrying away of any of the materials that constitute the lands of the plaintiff, the subject of this suit.

DONE AND ORDERED at Miami, Florida, this 20 day of November, 1957.

ROBERT H. ANDERSON
CIRCUIT JUDGE

APPENDIX VIII

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT.

JULY TERM, A.D. 1960

CASE NO. 59-528

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Appellant,

-vs-

JOHN G. DUPUIS, JR.,

Appellee.

PETITION FOR REHEARING

COMES NOW appellee in the above-styled cause, JOHN G. DUPUIS, JR., by and through his undersigned attorney, and respectfully files this Petition for Rehearing on the grounds and for the following reasons, that:

1. The Court overlooked the fact that **two separate statutes of limitation had run against the Trustees of the Internal Improvement Fund of the State of Florida, under whom the appellant must claim.** Those limitations, being 20-year periods, are specifically made applicable by Chapter 95.021, F.S.A., to the Trustees of the Internal Improvement Fund, or any State Agency.

2. The Court overlooked the case of **Union Trust Co. v. Southern Inland Nav. & Improv. Co.** (Fla. 1888), 130 US 565, 9 S.Ct. 606, 32 L.Ed. 1043, which held that the Trustees of the Internal Improvement Fund could not give an instrument that would be valid after the court had once entered its temporary injunction.

3. The Court overlooked in its opinion that the answer of the appellant did not claim as assignee of an easement reserved by the Trustees of the Internal Improvement Fund, and that nowhere in said answer is a definite easement claimed because the record shows that at the time the answer was filed the appellant had taken no easement of any of the rights of the Trustees, thus showing that the appellant would be barred from trying to show after acquired title or title in the third party and thus the appellant would be barred by the cases of **Simmons v. Spratt**, 20 Fla. 495; **Jones v. Lofton**, 16 Fla. 189; **Skinner Mfg. Co. v. Wright**, 56 Fla. 561, 47 So. 931; **Florida Finance Co. v. Sheffield**, 56 Fla. 285, 48 So. 42. Title in a third party is not a predicate upon which person with title and possession can be ousted, **Hogans v. Carruth**, 19 Fla. 84, and title which did not exist until after the commencement of the suit cannot be relied on by the appellant, **Carn v. Haisley**, 22 Fla. 317.

4. The Court overlooked that the appellant has not pleaded that the lands or any of them are necessary to drainage or reclamation of the swamplands given to the State of Florida by the Swamp Lands Act of 1850, and that no resolution or action of the Board of Governors of the Flood Control District, or of the Trustees, is shown in the record, stating that any of the appellant's lands are necessary for said purposes, thus leaving only the Distrist Court of Appeal, Third District, deciding as a matter of law that the taking of 12 acres of appellant's lands is necessary to drainage and reclamation.

5. The Court overlooked that the Flood Control District, through its executive officer, stated in unequivocal language, "We are nothing but a flood control

and water conservation outfit", leaving only this Court to say that any of their actions taken in this connection are being done for drainage and reclamation of swamp lands.

6. The Court failed to consider, and overlooked the fact that the record shows that although 16 acres are now claimed by the appellant, and would be theirs if the opinion of this Court is upheld, that they still have the right to go on and claim other lands of the appellant, thus making his contract of purchase a nullity, and making the contract of conveyance of 1910 (which was exchange of lands between Bolles and the Trustees for a valuable consideration), an absolute nullity, for everything granted in the granting clause could be taken away by this interpretation of the reserving clause. An interpretation of the habendum clause in a deed cannot void or nullify the granting clause, **Wright** v. **Smith**, 60 So. 2d 688,689; **Henry** v. **White**, 60 So.2d 149, 152.

7. The Court failed to consider, or overlooked the fact that the lower court made numerous findings of fact based on competent evidence in the record, and also made decisions on law based on the statutes and laws applicable, including the Constitutions of the United States and the State of Florida, which the Court did not treat in its opinion so as to reverse the findings of fact and conclusions of law.

Respectfully submitted,

JOHN E. KIRK
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FILE COPY

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JUN 2 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 945

JOHN G. DUPUIS, JR.,

Petitioner,

vs.

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

Petition For A Writ of Certiorari To The Supreme Court of Florida

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RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

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RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

OPINION AND ORDERS BELOW

The opinion of the District Court of Appeal of Florida, Third District, is reported at 123 So.2d 34. The order of the Supreme Court of Florida denying certiorari is reported at 127 So.2d 679 and was entered January 31, 1961 (R. 253). On February 13, petitioner filed an "Ex-

traordinary Petition for Rehearing of Petition for a Writ of Certiorari" (See Certificate of Clerk, App. 1-2, infra). The Clerk of the Supreme Court of Florida returned this document to counsel for petitioner with an accompanying letter dated February 14, 1961, stating:

> "Dear Mr. Kirk:
>
> I am returning your 'Extraordinary Petition for Rehearing of Petition for a Writ of Certiorari' in the above cause as the rules of Court do not provide for filing such a paper." (App. 1-2, infra).

On February 21, 1961, petitioner filed a motion for waiver of Rule 4.5 (c) (6), Florida Appellate Rules, in the Supreme Court of Florida (R. 254-256; App. 1-2, infra). This motion was denied by the Supreme Court of Florida on March 6, 1961 (R. 257; App. 1-2, infra).

JURISDICTION

Petitioner attempts to invoke this Court's jurisdiction under 28 U.S.C., Sec. 1257 (3).

QUESTION PRESENTED

Petitioner attempts to raise questions concerning the interpretation of a 1910 deed reservation and, apparently, claims that the interpretation below has deprived him of his rights under "Constitutional Amendment V".

APPLICABLE PROVISIONS OF FLORIDA CONSTITUTION AND FLORIDA APPELLATE RULES

Florida Constitution, Article V, Section 4 (2), provides in pertinent part:

> " . . . The Supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

Florida Appellate Rule 3.14 provides:

"RULE 3.14. REHEARINGS

a. **Time For.** Unless further time is allowed, rehearings must be applied for by petition in writing within 15 days after the filing of the decision or order of the Court.

b. **Contents of Petition.** The petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted, and must set forth concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based.

c. **Service.** A copy of the petition shall be served upon the opposite party or counsel and proof of such service shall be transmitted to the Court with the petition. The petition for rehearing shall not be considered a part of the record in the cause, unless so ordered by the Court, or unless rehearing is granted. No oral argument will be allowed on the petition.

d. **Rule Violation.** In case of a substantial violation of any material provision of this rule, the petition will be stricken by the Court on its own motion and the contents will not be considered.

e. **Only One Petition Allowed.** The petitioner shall be entitled to file only one petition for rehearing with respect to the particular decision and no further petition or motion will be received or filed by the clerk or considered by the Court.

f. **Further Pleadings.** The opposing party may file and serve a reply to a petition for rehearing within 5 days after he is served with a copy of the petition. No other pleadings shall be allowed."

REASONS FOR DISMISSING OR DENYING THE WRIT

Respondent respectfully submits that the petition should be dismissed or denied because:

1. The petition is untimely filed.

2. The petition does not seek review of a final judgment and is directed to the wrong court.

3. No Federal question was timely raised in the Florida courts.

4. On the merits, petitioner has not been denied due process of law.

A. The Petition Is Untimely Filed.

The petition was filed on May 4, 1961, ninety three days after denial of certiorari on January 31, 1961, by the Supreme Court of Florida (R. 253). Petitioner's abortive attempts to file a petition for rehearing in the Supreme Court of Florida did not toll the time for taking certiorari. Consequently, the petition should be dismissed because untimely under 28 U.S.C., Sec. 2101 (c).

Neither the "Extraordinary Petition for Rehearing" which petitioner sent and the Clerk of the Supreme Court of Florida returned, nor the motion to waive the appellate rules operated to toll the time for certiorari. The "extraordinary" petition was returned because not provided for in the rules; and the subsequent motion to waive the appellate rules was not even filed until after the fifteen days for filing a petition for rehearing had expired Fla. App. Rule 3.14.

In Section 43 of Robertsen & Kirkham, **Jurisdiction Of The Supreme Court Of The United States**, (1951 Ed.), pp. 75-76, the authors state the law:

"But of course, the time is not extended by

> a petition which is stricken for violation of the Court's procedural rules or by a second petition for rehearing which the highest state court has denied leave to file."

In **Bowman v. Loperena**, 311 U.S. 262, 266, this Court stated the general rule as follows:

> "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot opperate to extend the time for appeal."

B. **Certiorari Directed To Wrong Court And Wrong Judgment.**

Under Florida practice, review of a District Court of Appeal decision by the Supreme Court is discretionary. Article V, Section 4 (2), Florida Constitution provides that the Supreme Court, under certain circumstances, "may review by certiorari any decision of a district court of appeal ... ." In Florida, denial of certiorari is not a review on the merits. **Southern Bell Telephone & Telegraph Co. v. Bell**, Fla., 116 So.2d 617.

The present petition is erroneously directed to the Supreme Court of Florida. E.g., **Mich.-Wis. Pipe Line Co. v. Calvert**, 347 U.S. 157. Moreover, the petition seeks "to review the judgment of the Supreme Court of Florida entered in the above entitled cause on March 6, 1961, which said judgment foreclosed petitioner from any relief by virtue of that certain judgment of the Supreme Court

of Florida dated January 3, 1961." (Petition, p. 1). The March 6, 1961 judgment merely denied petitioner's motion to waive Rule 4.5(c)(6), Florida Appellate Rules (R. 257), and the judgment dated January 31, 1961 was a denial of the petition for a writ of certiorari, not an adjudication on the merits (R. 253). The only "final judgment" in this case within the meaning of 28 U.S.C., Sec. 1257 (3) is that of the District Court of Appeal of Florida, Third District, reported at 123 So.2d 34.

C. **No Federal Question Raised Below.**

Examination of the record shows that Petitioner never raised and the Florida courts never considered the due process question now sought to be raised. The only mention of the United States Constitution in the proceedings below is the following paragraph in petitioner's petition for rehearing in the District Court of Appeal:

> "The Court failed to consider, or overlooked the fact that the lower court made numerous findings of fact based on competent evidence in the record, and also made decisions on law based on the statutes and laws applicable, including the Constitutions of the United States and the State of Florida, which the Court did not treat in its opinion so as to reverse the findings of fact and conclusions of law." (R. 249-251).

The petition for rehearing was denied, without an opinion (R. 248).

Under the cases, the above passing reference, in a petition for rehearing was neither timely nor specific

enough to raise any question in this Court. E.g., **Herndon v. State of Georgia,** 295 U.S. 441. The decision below could have come as no surprise to petitioner in view of the prior cases cited in the District Court of Appeal's decision. E.g., **Albury v. Central & Southern Florida Flood Control District,** (Fla. App. 1958), 99 So.2d 248, and the two prior decisions in the instant case reported at 105 So.2d 36 and 109 So.2d 596.

D. **On the Merits, Petitioner Has Not Been Denied Due Process of Law.**

The 1910 deed containing the reservation in question was recorded on July 5, 1910 (Respondent's Exhibit "D"). The petitioner purchased his land, which was part of the land conveyed by the 1910 deed, on September 9, 1931, subject to and on notice of said reservation (Petitioner's Exhibit "1"). **Maule Industries v. Sheffield Steel Products,** (Fla. App. 1958), 105 So.2d 798.

The pivotal issue in the trial court and on appeal was the construction of a reservation contained in a deed conveying Florida real property (R. 8-9). The construction, interpretation and validity of the reservation rests upon Florida real property law. **Conner v. Elliott,** 79 Fla. 513, 85 So. 164, *cert. dismissed* 254 U.S. 665. The reservation was construed and held to be valid in **Albury v. Central & Southern Florida Flood Control District,** supra. It is well settled that this Court will not review judgments of state courts that rest on adequate and independent state grounds. **Herb v. Pitcairn,** 324 U.S. 117.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be dismissed or denied.

Dated this 1st day of June, A.D. 1961.

CHAS. H. GAUTIER

CHARLES H. GAUTIER
Attorney for Respondent
Dade Federal Building
Miami 32, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief and Appendix In Opposition to Petition For a Writ of Certiorari To The Supreme Court of Florida was mailed to B. E. Hendricks and John E. Kirk, Attorneys for Petitioner, 414 Seybold Building, Miami 32, Florida, this 1st day of June, 1961, by depositing same in a United States Post Office with first class postage prepaid.

CHAS. H. GAUTIER

Attorney for Respondent

APPENDIX A

Certificate of Guyte P. McCord, Clerk of Supreme Court of Florida:

IN THE SUPREME COURT OF FLORIDA

JOHN G. DUPUIS, JR.,

Petitioner,

vs.

CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT,

Respondent.

CERTIFICATE OF CLERK

I, GUYTE P. MC CORD, Clerk of the Supreme Court of Florida do hereby certify:

THAT on January 31, 1961, an order was filed herein denying the Petition for Writ of Certiorari.

THAT on February 13, 1961, an "Extraordinary Petition for Rehearing of Petition for a Writ of Certiorari" arrived in the mail.

THAT on February 14, 1961, the "Extraordinary Petition For Rehearing of Petition for a Writ of Certiorari" was returned with the following letter:

"February 14, 1961

"Honorable John E. Kirk
Attorney at Law
414 Seybold Building
Miami 32, Florida

"Re: John G. Dupuis, Jr. vs. Central and Southern Florida Food Control District

"Dear Mr. Kirk:

"I am returning your "Extraordinary Petition for Rehearing of Petition for a Writ of Certiorari" in the above cause as the rules of Court do not provide for filing such a paper.'

"Most cordially,

/s/ GUYTE P. McCORD
"Clerk Supreme Court.

"GPM:sg
"cc: Hon. Charles H. Gautier
Attorney at Law
Dade Federal Building
Miami 32, Florida'

THAT on February 21, 1961, a Motion for Waiver of Rule 4.5, Sub-Section C (6), Florida Appellate Rules was filed herein.

THAT on March 6, 1961, an order was filed herein denying the Motion for Waiver of Rule 4.5, Sub-Section C (6), Florida Appellate Rules.

THAT petitioner, John G. Dupuis, Jr., did not file a petition for rehearing other than said "Extraordinary Petition for Rehearing of Petition for Writ of Certiorari."

THAT no order was entered extending or granting petitioner, John G. Dupuis, Jr., additional time within which to file a petition for rehearing.

All according to the files and records of this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the Supreme Court of Florida on this 22 day of May, 1961.

/s/ Guyte P. McCord
GUYTE P. McCORD
Clerk, Supreme Court

(Seal, Supreme Court
of Florida)